

IP 06-0008-CR 18 M/F US v Cook & US v Boswell
Magistrate Kennard P. Foster

Signed on 7/11/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
COOK, BRADLEY E.,)	CAUSE NO.
IP06-0008-CR-018-M/F)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO. IP 06-08-CR- -M/F
)	
BRADLEY E. COOK)	-18
and)	
RUSSELL L. BOSWELL,)	-19
)	
Defendants.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendants are charged in a superseding indictment returned on June 27, 2006.

Bradley E. Cook is charged with one count of conspiracy to possess with intent to distribute 5 kilogram or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Russell L. Boswell is charged with two counts of using a communications facility to facilitate the commission of a drug trafficking offense in violation of 21 U.S.C. § 843(b), and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). With regard to Bradley Cook, the government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(A), (f)(1)(C), and (f)(2)(A) on the grounds that Cook is charged with a drug trafficking offense with the maximum term of imprisonment of life as prescribed in the Controlled Substances Act, and

the defendant is a serious risks of flight, if released. With regard to Russell Boswell, the government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(A), (f)(2)(A) and (f)(2)(B) on the grounds that Boswell is charged with a crime of violence, is a serious risks of flight, if released, and is a serious risk to obstruct, or attempt to obstruct, or threaten, injure, or intimidate or attempt to threaten, injure or intimidate a prospective witness. As the defendants were named in the same superseding indictment, the detention hearings were combined and held on July 5, 2006. The United States appeared by Josh Minkler, Assistant United States Attorney. Bradley Cook appeared in person and by his appointed counsel, James A. Edgar. Russell Boswell appeared in person and by his appointed counsel, Victoria Bailey.

At the detention hearing, the Government rested on the presumption established by the indictment, and testimony from United States Drug Enforcement Administration Special Agent Kevin W. Steele. The defendants proffered evidence, but did not present testimony. The Court found that the indictment constituted probable cause to believe that the defendants committed the crime charged. The charge in the indictment gives rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendants will not be serious risks to flee if released..

The evidence presented at the detention hearing did not rebut the presumptions that the defendants are serious risks of flight, or rebut the presumption found in 18 U.S.C. § 3142(e) that the defendants are dangers to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the evidence that the defendants will be serious risks of flight if released. Consequently, the defendants were ordered detained.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. The defendants are charged in a superseding indictment returned on June 27, 2006. Bradley E. Cook is charged with one count of conspiracy to possess with intent to distribute 5 kilogram or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Russell L. Boswell is charged with two counts of using a communications facility to facilitate the commission of a drug trafficking offense in violation of 21 U.S.C. § 843(b), and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

2. Based on the amount of cocaine alleged in the indictment, the penalty for the conspiracy to possess with the intent to distribute and to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b) and 846 is a mandatory minimum sentence of 10 years and a maximum of life imprisonment. Defendant Bradley Cook has a prior felony conviction for a drug offense. If the government files an information alleging the prior conviction, the mandatory minimum sentence would be 20 years. With regard to Boswell, the maximum penalties for violating 18 U.S.C. § 922(g)(1), as charged in the indictment include ten years' incarceration, three years of supervised release, and a fine of \$250,000.

3. The Court takes judicial notice of the Indictment in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. The government submitted the matter on the indictment and the testimony of Special Agent Kevin W. Steele. Special Agent Steele testified that he was one of the lead investigators into this matter, and that he was familiar with controlled purchases of cocaine, seizures of cocaine, electronic surveillance (including Title III Wiretaps on four telephones used by the co-

conspirators) visual surveillance, and search warrants executed as part of a year long investigation conducted by the United States Drug Enforcement Administration and the Indiana State Police.

Steele testified that Boswell was a distributor of marijuana for the Scruggs organization. Steele testified that Boswell also collected money for the organization. According to the Title III evidence, Thomas instructed Boswell to use violence or assault individuals to collect the money for the organization. Steele testified that Boswell's residence, that he shared with co-defendant Diana Resendiz, was searched on January 12, 2006. A loaded firearm was recovered, and Boswell admitted the firearm was his and that he obtained it for personal protection. Boswell further admitted to distributing marijuana for Randy Thomas.

Steele testified that Brad Cook was a distributor of cocaine for the organization. Steele testified that Cook met with the courier for the organization, Brian Buchanan, and provided Buchanan with money prior to Buchanan obtaining cocaine for the organization. Steele testified that Cook often met with Scruggs and the three sources of supply, Carlos Torres, Francisco Betancourt, and Nestor Carmona, at the residence of Daniel Cook, located at 9716 W. Conservation Lake Road, Deputy, Indiana which was used as a "stash house," during the conspiracy. Steele testified that John Scruggs and Randy Thomas maintained sizeable amounts of easily accessible cash to purchase large quantities of cocaine as well as large quantities of cocaine to distribute to the mid-level distributors at this residence. Defense counsel for Bradley Cook and Russell Boswell cross-examined Special Agent Steele on all issues pending before the Court. The Court admitted the PS3 for both defendants. Bradley Cook has the following criminal convictions: 6/25/02 OWI Cook was place on probation for that offense and violated the conditions of that probation. His probation was revoked and he was sentenced to 50

days in jail. 9/30/04 Possession of Cocaine Cook was sentenced to 170 days in jail and placed on probation for three years. Cook was on probation at the time of this offense. Boswell has the following criminal convictions. 11/15/92 Assault; 12/11/95 Battery Causing Injury; 10/13/99 Battery; 10/13/99 Possession of Marijuana; 10/22/03 Battery Causing Serious Bodily Injury for which he was sentenced to six years with one year suspended. Boswell was on probation for that charge at the time of the instant offense.

5. The Court finds that the indictment establishes probable cause for the offense charged, and the rebuttable presumptions arise that the defendants are serious risks of flight and dangers to the community. 18 U.S.C. § 3142(e).

6. In the first instance, the evidence at the detention hearing does not rebut the presumptions found in 18 U.S.C. § 3142(e) that the defendants are serious risks of flight and a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the evidence that the defendants will be a serious risks of flight if released. Additionally, the evidence relevant to the factors set forth in 18 U.S.C. § 3142(g) requires that Defendant be detained as there is no condition or combination of conditions of release sufficient to reasonably assure that they will not engage in dangerous criminal activity pending trial. Therefore, Bradley E. Cook and Russell L. Boswell are ORDERED DETAINED.

7. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the

standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(A), (f)(1)(C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of § 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention

may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

8. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant’s appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et*

seq.; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a “bursting bubble”. *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress’ finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case. The Court further finds that the evidence at the detention hearing did not rebut the presumptions that the defendants are serious risks of flight and dangers to the community.

10. Assuming *arguendo* the defendants had rebutted both of the presumptions, they would still be detained. The Court considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant’s character, physical and mental condition,

family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. This case charges the defendants based on an incipient conspiracy involving large quantities of cocaine. Cocaine was purchased during controlled purchases, recovered during law enforcement interdictions of cocaine couriers, and seized pursuant to search warrants authorized by this Court. Each of the defendants participated in this ongoing conspiracy for well over one year. This demonstrates that this crime and each of the defendants' conduct involves a narcotic drug.

b. The evidence demonstrates a strong probability of conviction as to all defendants.

c. Defendant Bradley E. Cooks faces a possible mandatory sentences of 20 years imprisonment. This mandatory sentence when coupled his prior criminal history, substantially increases the seriousness of his risk for flight.

d. Defendant Russell L. Boswell has had persistent and continuous contacts with law enforcement. In light of the number and nature of these contacts, the defendant has established a pattern of violence and disregarding the law. He is a scofflaw who continually flouts the law. If released, he will not follow the law or the conditions of pre-

trial release. Boswell presents a serious risk to the community. Boswell has a history violating terms of court-imposed probation. Boswell presents a serious risk of flight.

e. During the course of the conspiracy, members of the conspiracy possessed firearms, including assault rifles, shotguns, pistols and revolvers. Firearms are a “tool of the trade” for a drug trafficker, as they are utilized to safeguard narcotics, United States currency, and the physical well-being of the narcotics trafficker from rival traffickers. The Court finds that the use and possession of firearms during this conspiracy was foreseeable to all defendants, including defendants Bradley Cook and Russell Boswell. Indeed, defendant Boswell was found to have a loaded firearm in his residence when those residences were searched. Coconspirators are liable for all foreseeable acts committed in furtherance of the conspiracy, *Pinkerton v. United States*, 328 U.S. 640 (1946). Therefore, the Court finds that the defendants have violated Title 18, United States Code, Section 924(c)(1), possession of a firearm in furtherance of a drug trafficking crime. The possession of firearms along with a highly addictive drug such as cocaine increases the risk of violence exponentially. It further clearly and convincingly demonstrates a specific danger to the community which would be created if the Court were to release the defendants.

f. The evidence that defendants Bradley Cook and Russell Boswell committed the instant offenses either while on probation and soon after release from a Court ordered sentence on other charges clearly and convincingly demonstrate the probable inability of any condition or combination of conditions of release to reasonably assure that they will not return to criminal activity or threaten the well-being of the community. 18 U.S.C. § 3142(g)(3) and (4).

g. The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that defendants have not rebutted the presumptions in favor of detention, and should be detained. Furthermore, they are, by the preponderance of the evidence, serious risks of flight and clearly and convincingly dangers to the community.

WHEREFORE, Bradley E. Cook and Russell L. Boswell are hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this _____ day of July, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

Distribution:
Josh J. Minkler,
Assistant U. S. Attorney
10 W. Market Street, Suite 2100
Indianapolis, Indiana 46204

James A. Edgar
Attorney at Law
1512 North Delaware
Indianapolis, Indiana 46202

Victoria Bailey
Attorney at Law
One Indiana Square

Suite 150
Indianapolis, Indiana 46204

U. S. Probation, Pre-Trial Services

U. S. Marshal Service